Supreme Court, U.S.
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No. 90-1250

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1990

BURLINGTON NORTHERN RAILROAD COMPANY;
R.H. SHALHOOP

Petitioners,

vs.

JOAN FAYE WHITT, ADMINISTRATRIX OF THE
ESTATE OF WILLIAM CHARLES WHITT, DECEASED

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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RESPONDENT'S SUPPLEMENTAL BRIEF

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QUESTIONS PRESENTED

WHETHER THIS PARTICULAR VERDICT CROSSES THE LINE INTO THE AREA OF CONSTITUTIONAL DUE PROCESS IMPROPRIETY UNDER THE PRINCIPLES ESTABLISHED BY THIS COURT IN *PACIFIC MUTUAL LIFE INSURANCE V. HASLIP* WHEN:

1. THE PRESENT VERDICT, UNLIKE THAT IN *HASLIP* OR ANY OTHER PUNITIVE CASE BEFORE THE COURT, WAS BASED UPON WANTON HOMICIDE COMPOUNDED BY COVER-UP; AND

2. THE PUNITIVE DAMAGE INSTRUCTIONS GIVEN TO THE JURY IN THE PRESENT CASE WERE VIRTUALLY IDENTICAL TO THOSE GIVEN AND CONSTITUTIONALLY APPROVED IN *HASLIP*; AND

3. THE PRESENT VERDICT WAS SUBJECTED TO THE IDENTICAL POST-VERDICT REVIEW, AT BOTH THE TRIAL AND APPELLATE LEVELS, UNDER THE SAME *HAMMOND* STANDARDS AS WERE CONSTITUTIONALLY AFFIRMED IN *HASLIP*; AND

4. THE PRESENT VERDICT, BEYOND BEING SUBJECTED TO THE SAME POST-VERDICT REVIEW AS THE VERDICT IN *HASLIP*, WAS REDUCED $10,000,000; AND

5. THE WRONGFUL DEATH STATUTE, UPON WHICH THE PRESENT VERDICT IS BASED, SHARES THE SAME HISTORICAL COMMON LAW HERITAGE GIVEN DEFERENCE IN *HASLIP*?

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REASONS FOR DENYING THE WRIT

I. THE PRESENT VERDICT, UNLIKE THAT IN HASLIP OR ANY OTHER PUNITIVE AWARD BEFORE THIS COURT, WAS BASED UPON WANTON HOMICIDE COMPOUNDED BY COVER-UP, THUS SATISFYING THIS COURT'S CONCERN THAT THE AMOUNT OF THE AWARD CORRECTLY REFLECT THE GRAVITY OF THE OFFENSE.

Justice O'Connor, speaking in her *Haslip* dissent, incorrectly characterizes this as a case in which the Burlington Northern train was being operated properly and the deceased negligently placed himself in its path. *Pacific Mutual Life Ins. Co. v. Haslip*, 553 So. 2d 537 (Ala. 1989), *cert. granted*, 110 S. Ct. 1780 (1990), *aff'd*, ___ S. Ct. ___, 59 U.S.L.W. 4157 (U.S. March 4, 1991) (No. 89-1279). Respondent Whitt respectfully disagrees. The record, the jury verdict and the opinion of the Alabama Supreme Court indicate that this is a case of wanton homicide. The *Whitt* jury's verdict constitutes the expressed conscience of a community as to the sanctity of life when measured by the reckless killing of one of her citizens. The jury had before it facts showing that the engineer knew this to be a populous

crossing, he was exceeding the railroad's own speed limit, no signal lights were flashing, no horn was blowing and, despite seeing the deceased upon the track, no brakes were applied save at the very moment of impact. *See* Pet. at App. 3a, 4a, 6a, 18a, 1387, 1393, 1402, 1416, 1443, 1452, 1464, 1479, 1492, 1511, 1526, 1534 & 1756. Such heightened culpability was compounded by the post-accident actions of cover-up in removing underbrush from the negligently obstructed right-of-way and sending an employee to trigger the signal lights. Pet. at App. 6a, Tr. at 1400. Any suggestion of contributory negligence was removed from juror minds by evidence that the right-of-way was so obstructed that motorists were forced to get "right on top" of the track before being able to negotiate a safe crossing. Pet. at App. 12a. Additionally, the jury was charged repeatedly that contributory negligence is no defense to wantonness. *See* Tr. at 2086.

Wantonness was the central focus of this case. Blackletter Alabama law, evidenced in *Pattern Jury Instruction* 11.18,

provides that punitive damages in wrongful death "should be directly related to the amount of wrongdoing on the part of defendant". Consistent with that principle, the trial judge meticulously gave the *Whitt* jury innumerable charges in which he explained the concept of wantonness. Tr. at 2085 - 2095. Illustrative of these instructions are the following:

> To constitute willful injury or wanton negligence there must be a design, purpose or intent to do wrong or reckless indifference or disregard for the natural or probable consequences of the act done. Tr. at 2095.
>
> Evidence that a train is speeding through a populous crossing and that the train was operated without warning or signals is evidence of wanton conduct ... Tr. at 2091.

Additionally, the level of Burlington Northern's culpability constituted one of the *Hammond* standards against which the verdict was tested during the successive levels of extensive post-verdict review. *See Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986); *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989). In fact, the Alabama Supreme Court affirmed this verdict at $ 5,000,000 after making the following observations:

> There was, without a doubt, substantial evidence of wantonness, and we hold that the issue was properly submitted to the jury. Pet. App. at 18a.
>
> In short, there was sufficient evidence to defeat the defense of contributory negligence, and the issue was properly submitted to the jury for its resolution. Pet. App. at 19a.

On Monday, March 18, 1991, in the aftermath of *Haslip*, this Court remanded seven punitive verdicts. No such action is necessary in the present case, however, because the *Whitt* verdict fully satisfies all the constitutional requirements set forth in *Haslip*. Constitutionally approved jury charges were given and post-verdict review standards were applied. Most crucially, however, the present verdict amount was specifically tailored to fit the petitioners' heightened level of culpability, consisting of wanton homicide compounded by cover-up. This single characteristic distinguishes this punitive award from all others before the Court and, thereby, justifies either the denial of *certiorari* review or full affirmance of the judgment below.

II. THE WHITT VERDICT WAS REACHED UPON JURY INSTRUCTIONS VIRTUALLY IDENTICAL TO THOSE CONSTITUTIONALLY DECLARED IN HASLIP TO SATISFY DUE PROCESS.

This Court's review of the *Haslip* jury instructions revealed charges that cautioned the jury to return a verdict that, while not serving to compensate the victim, would punish this defendant and deter him and others from like conduct in the future. 59 U.S.L.W. at 4162.

The *Whitt* jury likewise was instructed as to the factors properly considered in levying a punitive-only, wrongful death verdict. The following illustrative charges demonstrate the prerequisite emphasis, as required by *Haslip*, upon deterrence, retribution and the non-compensatory nature of recovery:

> In a suit ... for wrongful act, ... causing death, the damages recoverable are punitive not compensatory. Damages in this type of action are entirely punitive and imposed for the preservation of human life and as a deterrent to others to prevent similar wrongs. The amount of damages should be directly related to the amount of wrong doing on the part of the Defendants. Tr. at 2103.

> In assessing damages, you are not to consider the money value of the life of the deceased for damages of this type are not recoverable to compensate the family ... of the deceased from a standpoint on the account of his death nor to compensate the Plaintiff for any financial or pecuniary loss sustained by him or the family of the deceased on the account of his death. Tr. at. 2103.

The foregoing charges, when combined with others duly given, follow with near-precision the model instructions promulgated for use by all Alabama judges in wrongful death cases. *See Alabama Pattern Jury Instructions Civil* 11.18. The charges in *Whitt* reasonably may be argued to even exceed those given in *Haslip*.

III. THE WHITT VERDICT, LIKE THAT IN HASLIP, WAS SUBJECTED TO SUCCESSIVE LEVELS OF POST-VERDICT REVIEW UNDER THOSE SUBSTANTIVE HAMMOND STANDARDS WHICH THIS COURT HELD, IN HASLIP, TO SATISFY CONSTITUTIONAL DUE PROCESS REQUIREMENTS.

All post-trial procedures for reviewing punitive awards, constitutionally approved in *Haslip*, are equally applicable in wrongful death cases. *See Black Belt Wood Co. v. Sessions*, 514 So. 2d 1249 (Ala. 1986). True to this precedent, the Alabama

Supreme Court devoted six pages of its decision below to the *Hammond* standards and their use in reviewing the amount of the present verdict. Pet. App. 19a - 24a. This extensive post-verdict review satisfies the overriding *Haslip* concern of ensuring that the punitive award is not "grossly out of proportion to the severity of the offense ..." 59 U.S.L.W. at 4162. As with petitioner Pacific Mutual in *Haslip*, Burlington Northern:

> [H]ad the benefit of the full panoply of Alabama's procedural protections. The jury was adequately instructed. The trial court conducted a post-verdict hearing that conformed with *Hammond*. The Trial court specifically found that the conduct in question 'evidenced [the prerequisite culpability] and found the amount of the award to be reasonable in light of the importance of discouraging ... similar conduct ... [and the defendant] also received the benefit of appropriate review by the Supreme Court of Alabama. 59 U.S.L.W. at 4163.

IV. THE WHITT VERDICT, IN ADDITION TO RECEIVING THE SAME POST-VERDICT REVIEW UNDER THE IDENTICAL OBJECTIVE STANDARDS AS WERE CONSTITUTIONALLY AFFIRMED IN HASLIP, WAS REDUCED $ 10,000,000 BY THE ALABAMA SUPREME COURT; THUS FURTHER DIVESTING THE RESULTING AWARD OF ANY HINT AS TO UNBRIDLED JURY DISCRETION THAT HAS "RUN WILD".

Essential to the *Haslip* holding, that Alabama's standards for conducting post-verdict review are constitutional, is the recognition that these standards "have real effect when applied by the Alabama Supreme Court to jury awards". 59 U.S.L.W. at 4162. As this Court emphasizes in *Haslip*, application of the *Hammond* standards regularly results in punitive damage reductions. 59 U.S.L.W. at 4162. The *Whitt* verdict, a product of the highest verdict remittitur in Alabama history, stands as a unique example of such judicial oversight. Such significant judicial intervention should go far in satisfying Justice O'Connor's concern, expressed in *Haslip*, that effective review is unavailable in Alabama due to judicial deference to juries. 59 U.S.L.W. at 4171-72.

V. ALABAMA'S PUNITIVE-ONLY WRONGFUL DEATH STATUTE SHOULD BE AFFORDED THE SAME DEFERENCE GIVEN IN HASLIP TO OTHER HISTORIC COMMON LAW METHODS OF ASSESSING PUNITIVE DAMAGES.

While not completely determinative of constitutionality, great emphasis is placed in *Haslip* upon the majority's recognition that the common law method of assessing punitive damages is a creature of historic common law. 59 U.S.L.W. at 4161. Respondent Whitt respectfully requests that similar deference be given to the fact that Alabama's wrongful death act was enacted in 1852, sixteen years before adoption of the Fourteenth Amendment, with its punitive-only interpretation coming in 1877. *See Black Belt Wood*, 514 So. 2d at 1261. Such history guarantees that Alabama's wrongful death statute "will need a strong case for the Fourteenth Amendment to affect it." *Haslip*, 59 U.S.L.W. at 4161. This is particularly so since this Court, as observed in *Haslip*, upheld the due process constitutionality of Alabama's statute in 1927. *Louis Pizitz Dry Goods v. Yeldell*, 274 U.S. 112 (1927).

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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